A

Selaman Sdn Bhd & Anor v Pinang Sari Sdn Bhd

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(W)-1293–08 OF 2015
ROHANA YUSUF, VERNON ONG AND HASNAH HASHIM JJCA
14 JULY 2017

C

Contract — Time — Time is of the essence — First appellant vide share sale agreement agreed to sell shares in second appellant to respondent — Respondent failed to pay third payment even after extension of time — First appellant terminated agreement and forfeited deposit — Whether time of the essence of agreement after expiry of due date for performance of third payment

D

Pursuant to a share sale agreement ('the agreement'), the respondent agreed to purchase and the first appellant agreed to sell all the shares in the second appellant to the respondent for RM50,352,746.40. Under cl 13 of the agreement, time was of the essence of the agreement. The respondent had paid the first and second payments but failed to pay the third payment within the stipulated time. The first appellant granted extension of time to effect the third payment on 15 January 2014 ('the first extension'), 29 January 2014 ('the second extension') and 15 February 2014 ('the third extension'). After the third extension, the respondent asked for a further extension until 28 February 2014 but the first appellant rejected the respondent's proposal and subsequently terminated the agreement and forfeited the deposit. Consequently, the respondent filed an action challenging the termination of the agreement by the first appellant ('the termination'). The High Court found that the termination was unlawful as the extended timeframe for the payment of the third payment was not of the essence of the agreement. The court further granted an order of specific performance of the agreement in favour of the respondent. The present action was the appellants' appeal against the decision of the High Court. The main issue to be determined was whether time was of the essence of the agreement after the expiry of due date for performance of the third payment.

E

F

G

H

Held, dismissing the appeal with costs and affirming the judgment of the High Court:

(1) There was no doubt that pursuant to cl 13 of the agreement time was originally of the essence of the contract. But that had been waived by the conduct of the appellants. Once the time for completion was allowed to pass and the parties went on negotiating, then time was no longer of the essence of the contract and it was incumbent upon the first appellant to give a reasonable notice of its intention to abandon the contract if the

I

A third payment was not paid. Based on the above, the court agreed with the learned judge that the termination of the agreement by the first appellant was unlawful. Thus, the agreement was a valid and subsisting contract (see paras 29–30).

B (2) The court disagreed with the submission of the appellants that there was bad faith displayed by the respondent which should disentitle it to the remedy of specific performance. There was no evidence to support their contention that the respondent did not come with clean hands. In the circumstances of the case, damages were not an adequate remedy as the C subject matter of the agreement was the shares. The court was satisfied that the learned judge correctly applied the legal principles to the facts of the case and that the respondent was entitled to the remedy of specific performance (see para 31).

D **[Bahasa Malaysia summary**

Menurut perjanjian jualan saham ('perjanjian tersebut'), responden telah bersetuju untuk membeli dan perayu pertama telah bersetuju untuk menjual semua saham dalam perayu kedua kepada responden untuk RM50,352,746.40. Di bawah fasal 13 perjanjian tersebut, masa adalah inti E pati perjanjian tersebut. Responden telah membayar bayaran pertama dan kedua tetapi gagal untuk membayar bayaran ketiga dalam masa yang ditetapkan. Perayu pertama telah memberikan lanjutan masa untuk melaksanakan bayaran ketiga pada 15 Januari 2014 ('lanjutan pertama'), 29 Januari 2014 ('lanjutan kedua') dan 15 Februari 2014 ('lanjutan ketiga'). F Selepas lanjutan ketiga, responden telah meminta untuk lanjutan selanjutnya sehingga 28 Februari 2014 tetapi perayu pertama telah menolak permohonan responden dan akhirnya telah menamatkan perjanjian tersebut dan melupuskan deposit itu. Berikutan itu, responden telah memfailkan tindakan untuk mencabar penamatan perjanjian tersebut oleh perayu pertama G ('penamatan tersebut'). Mahkamah Tinggi mendapati bahawa penamatan tersebut adalah menyalahi undang-undang kerana tempoh masa yang dilanjutkan untuk pembayaran bagi bayaran ketiga bukan merupakan inti pati perjanjian tersebut. Mahkamah selanjutnya memberikan perintah untuk pelaksanaan spesifik perjanjian tersebut yang menyebelahi responden. H Tindakan ini adalah rayuan perayu-perayu terhadap keputusan Mahkamah Tinggi. Isu utama untuk ditentukan adalah sama ada masa adalah inti pati perjanjian tersebut selepas luput tarikh tamat tempoh untuk pelaksanaan bayaran ketiga itu.

I **Diputuskan,** menolak rayuan dengan kos dan mengesahkan penghakiman Mahkamah Tinggi:

(1) Tiada keraguan bahawa menurut fasal 13 perjanjian tersebut masa adalah pada asalnya inti pati kontrak. Namun begitu ia diketepikan oleh kelakuan perayu-perayu. Apabila masa untuk siap dibenaran untu

berlalu dan pihak-pihak terus berbincang, maka masa itu tidak lagi merupakan inti pati kontrak dan ia adalah kewajipan perayu pertama untuk memberikan notis munasabah tentang niatnya untuk meninggalkan kontrak tersebut jika bayaran ketiga tidak dibayar. Berdasarkan itu, mahkamah bersetuju dengan hakim yang bijaksana bahawa penamatan perjanjian tersebut oleh perayu pertama adalah menyalahi undang-undang. Oleh itu, perjanjian tersebut adalah kontrak yang sah dan wujud (lihat perenggan 29–30).

(2) Mahkamah tidak bersetuju dengan hujah perayu-perayu bahawa terdapat niat jahat yang dipamerkan oleh responden yang patut menjadikannya tidak berhak kepada remedi pelaksanaan spesifik. Tiada keterangan untuk menyokong hujah mereka bahawa responden tidak datang dengan niat yang baik. Dalam keadaan kes tersebut, ganti rugi bukan remedi yang mencukupi kerana hal perkara perjanjian tersebut adalah mengenai saham. Mahkamah berpuas hati bahawa hakim yang bijaksana adalah betul dalam mengguna pakai prinsip-prinsip perundangan kepada fakta kes dan bahawa responden berhak kepada remedi pelaksanaan spesifik (lihat perenggan 31).]

Notes

For cases on time is of the essence, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 7364–7377.

Cases referred to

Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu [1997] 2 MLJ 45, FC (refd)
Associated Pan Malaysia Cement Sdn Bhd v Syarikat Teknikal & Kejuruteraan Sdn Bhd [1990] 3 MLJ 287, SC (folld)
Barclay v Messenger [1874–80] All ER Rep Ext 1908; [1874] 43 LJ Ch 449 (refd)
Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597, FC (refd)
Capping Corp Ltd & Ors v Aquawalk Sdn Bhd & Ors [2013] 6 MLJ 579, CA (refd)
Cipta Cermat Sdn Bhd v Perbandaran Kemajuan Negeri Kedah [2007] 2 MLJ 746, CA (refd)
Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd & Anor [2011] 6 MLJ 464, FC (folld)
Ganam d/o Rajamany v Somoo s/o Sinnah [1984] 2 MLJ 290, FC (refd)
Kabushiki Kaisha Ngu v Leisure Farm Corp Sdn Bhd & Ors [2016] 5 MLJ 557, FC (refd)
Koh Shey Guan v Lee Kok Chan [1971] 1 MLJ 79, FC (refd)
Loke Yuen Cheng & Anor v Vimtex Sdn Bhd [1998] 4 MLJ 169, CA (refd)
Pamaron Holdings Sdn Bhd v Ganda Holdings Bhd [1988] 3 MLJ 346, HC (refd)

Pentadbir Tanah Daerah Petaling v Swee Lin Sdn Bhd [1999] 3 MLJ 489, CA (refd)
Plenitude Holdings Sdn Bhd v Tan Sri Khoo Teck Puat & Anor [1992] 2 MLJ 68, HC (refd)
Siah Kwee Mow & Anor v Kulim Rubber Plantations Ltd [1979] 2 MLJ 190 (refd)
Spenser v Cali & Delonga [1980] ANZ ConvR 485 (refd)
Stancorp Sdn Bhd v Abadi Utama Development Sdn Bhd & Ors [2000] MLJU 309, HC (refd)
Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1993] 1 MLJ 113, SC (refd)
Thornton v Basset [1975] VR 407, SC (refd)
Tilley v Thomas (1867) LR 3 Ch App 61, CA (refd)
Webb v Hughes (1870) LR 10 Eq 281 (refd)
Wong Kup Sing v Jeram Rubber Estates Ltd [1969] 1 MLJ 245 (refd)

Legislation referred to

Contracts Act 1950 s 56(1), (2)
Rules of the Court of Appeal 1994 r 8
Specific Relief Act 1950 s 11(c)

Appeal from: Suit No 22NCC-174–05 of 2014 (High Court, Kuala Lumpur)

T Sudhar (Collin Goonting, Edward Kuruvilla and Winnie Chan with him) (Coolin Goonting & Assoc) for the appellant.
Robert Low (CL Tan and Karen Yong with him) (Ranjit Ooi & Robert Low) for the respondent.

Vernon Ong JCA:

INTRODUCTION

[1] This appeal relates to the decision of the High Court which ruled that the termination of the share sale agreement by the first defendant qua vendor was unlawful as the extended timeframe for the payment of the third payment was, amongst others, not of the essence of the agreement. Consequently the High Court granted an order of specific performance of the share sale agreement in favour of the plaintiff qua purchaser. This is the first and second defendants' appeal against the said decision.

THE SALIENT FACTS

[2] The background facts have been comprehensively set out in the written judgment of the learned judge. We will summarise the salient facts insofar as they relate to this appeal.

[3] The second defendant is a private limited company and is the registered proprietor and beneficial owner of two pieces of adjoining land (Lots 1915 and 2114) in the Mukim of Dengkil, Daerah of Sepang, Negeri Selangor ('the land'). A

[4] The second defendant is the wholly owned subsidiary of the first defendant. The first defendant holds the entire issued and paid-up share capital comprising of one million ordinary shares ('the shares') in the second defendant. The first defendant has ultimate control over the management and affairs of the second defendant including the land. B C

[5] Pursuant to a share sale agreement dated 23 October 2013 ('the SSA'), the plaintiff agreed to purchase and the first defendant agreed to sell all the shares for RM50,352,746.40 upon the terms and conditions therein contained. For convenience, we set out the sequence of events leading to the dispute between the parties in the following chronology: D

29 September 2013	The plaintiff paid the sum of RM1,007,054.93 being 2% of the purchase price to the first defendant pursuant to cl 3.3(a) of the SSA ('the first payment').
23 October 2013	SSA entered into between plaintiff and the first defendant.
4 November 2013	The plaintiff paid RM4,028,219.71 being 8% of the purchase price to the first defendant pursuant to cl 3.3(b) of the SSA ('the second payment').
5 December 2013	The plaintiff registered a private caveat over Lot 1915.
7 February 2014	The plaintiff registered a private caveat over Lot 2114.
15 December 2013	Due date for payment of RM10,070,549.28 ('the third payment') pursuant to cl 3.3(c).
29 October 2013	The first defendant granted the plaintiff an extension of time to effect the third payment by 15 January 2014 ('the first extension').
10 December 2013	The plaintiff acknowledged the granting of the first extension.
15 December 2013	Invoice issued by the first defendant to plaintiff for the third payment and late payment interest charge of 8%pa.
31 December 2013	The plaintiff requested for date for payment of the third payment falling due on 15 January 2014 to be extended to 31 January 2014 pursuant to cl 3.3(c).
10 January 2014	The first defendant granted the plaintiff an extension of time to effect the third payment by 29 January 2014 ('the second extension').

E F G H I

13 January 2014	The plaintiff's solicitors wrote to the first defendant's solicitors demanding for immediate delivery of 100,000 of the sale shares together with the duly executed transfer forms.
23 January 2014	The plaintiff requested for payment of the third payment to be extended to 15 February 2014.
29 January 2014	The first defendant agreed to extend the due date for the payment of the third payment to 15 February 2014 ('the third extension'). The first defendant reserved its rights to terminate the SSA and forfeit the deposit in the event of default in the payment of the third payment.
12 February 2014	Meeting between representatives of both parties.
14 February 2014	The plaintiff requested for further extension to 15 March 2014.
15 February 2014	Due date for payment of the third payment under the third extension.
18 February 2014	The plaintiff forwarded copies of offer letter from co-funder to the first defendant.
19 February 2014	Meeting between representatives of both parties.
20 February 2014	The plaintiff wrote to the first defendant with a proposal to pay the third payment on 28 February 2014.
27 February 2014	The first defendant rejected plaintiff's proposal to pay the third payment on 28 February 2014. The first defendant terminated the SSA and forfeited the deposit.
1 April 2014	The plaintiff's solicitors wrote to the first defendant's solicitors informing that the plaintiff have deposited the third payment and asked if the first defendant would give the plaintiff 'a written extension of one week from the date of receipt of your extension letter to effect the third payment pursuant to clause 3.3(c)'.
10 April 2014	The plaintiff's solicitors wrote to the first defendant's solicitor asking for the first defendant's response.
15 April 2014	The first defendant's solicitor wrote to plaintiff's solicitors informing that the SSA was terminated on 27 February 2014.
25 April 2014	The plaintiff's solicitors wrote to the first defendant's solicitors disputing the termination of the SSA by the first defendant.

FINDINGS OF THE HIGH COURT

[6] The findings of the learned judge may be summarised as follows:

(a) time is not of the essence of the performance of the third payment on the following grounds:

(i) based on cll 13 and 3.3(c) of the SSA, time is only of the essence where the same is not provided for under the SSA and cl 3.3(c) prescribes and limits for only one extension of time of up to 14 days. Since there are three extensions, cl 13 is not applicable. In granting the extensions, the first defendant did not expressly stipulate that time was to be of the essence. As such, the extended dates do not come within the ambit of cl 13 and are not essential to the SSA (*Capping Corp Ltd & Ors v Aquawalk Sdn Bhd & Ors* [2013] 6 MLJ 579 at p 586 (CA));

(ii) based on the following facts and circumstances of the case, including the conduct of the parties show that time was not intended and/or ceased to be of the essence:

(1) a series of extensions of time granted by the first defendant had induced the plaintiff to believe that time was no longer of the essence (*Plenitude Holdings Sdn Bhd v Tan Sri Khoo Teck Puat & Anor* [1992] 2 MLJ 68; *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1993] 1 MLJ 113 (SC); *Cipta Cermat Sdn Bhd v Perbandaran Kemajuan Negeri Kedah* [2007] 2 MLJ 746 (CA));

(2) the parties have agreed that interest is to be levied in respect of the delay for payment of the instalments including the third party; the imposition of interest is adequate compensation for delay for payment (*Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597 (FC));

(3) the first defendant had allowed the first due date for payment of the third payment and the subsequent first, second and third extensions to pass without terminating the SSA. As the first defendant did not stipulate a new date for the payment of the third party, an inference can be drawn that the first defendant had elected to waive the time stipulated for the performance; and

(4) the plaintiff did not remain silent when it encountered difficulties but took active steps to engage the first defendant to negotiate on the performance of the third party (*Webb v Hughes* (1870) LR 10 Eq 281; *Wong Kup Sing v Jeram Rubber Estates Ltd* [1969] 1 MLJ 245; *Berjaya Times Square*);

(b) the termination of the SSA by the first defendant is unlawful. The first defendant was not entitled to terminate the SSA as the SSA did not

become voidable (s 56(2) of the Contracts Act 1950); and

(c) the plaintiff is entitled to specific performance on the following grounds:

(i) the SSA is a valid subsisting contract;

(ii) damages is not an adequate remedy because the subject matter of the SSA is the first defendant's shares in the second defendant company (s 11(c) of the Specific Relief Act 1950; *Pamaron Holdings Sdn Bhd v Ganda Holdings Bhd* [1988] 3 MLJ 346; *Stancorp Sdn Bhd v Abadi Utama Development Sdn Bhd & Ors* [2000] MLJU 309);

(iii) the evidence showed that the plaintiff was at all times ready and willing to perform the SSA (*Ganam d/o Rajamany v Somoo s/o Sinnah* [1984] 2 MLJ 290 (FC); *Koh Shey Guan v Lee Kok Chan* [1971] 1 MLJ 79 at p 81 (FC)); and

(iv) the plaintiff produced sufficient and cogent evidence of private parties who are in the financial position to provide funds to assist the plaintiff to complete the purchase.

SUBMISSION OF PARTIES

[7] Learned counsel for the defendants advanced three main grounds to support the argument that time was of the essence notwithstanding the three extensions of time granted by the first defendant to the plaintiff.

[8] First, learned counsel argued that cl 13 of the SSA expressly provides that time shall be of the essence. As such, when the first defendant granted the extensions of time to the plaintiff, the first defendant had made it a point to retain its right to terminate the SSA in the event of default. Learned counsel also cited the Federal Court decision in *Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd & Anor* [2011] 6 MLJ 464 (FC) to support the proposition that in commercial contracts, there is a prima facie acceptance that time would be of the essence. As such, even if cl 13 was inapplicable, it was an implied term that time was to be of the essence as the SSA is a commercial contract.

[9] Second, learned counsel argued that the learned judge erred in law and in fact in finding that: (i) there was no new date for the performance of the third payment; and (ii) there was no prior notice given of the first defendant's entitlement to terminate the SSA. On point (i), learned counsel argued that the finding is inconsistent with the contemporaneous documents, in particular the first defendant's letters to the plaintiff dated 29 October 2013, 10 January 2014 and 29 January 2014, where the first defendant had expressly stipulated new dates for performance. The learned judge erred in finding that time is no longer of the essence of the SSA because the plaintiff took active steps to engage

the first defendant to negotiate on the performance of the third payment. In fact, the first defendant did not waive its right but merely suspended the exercise of its right until 27 February 2014. There was no clear and unequivocal election by the first defendant to accept the plaintiff's request for a fourth extension of time to make the third payment before the first defendant rescinded the SSA (KE Lindgren, *Time In The Performance of Contracts*, (2nd Ed) Butterworths at para 627). The giving of an extension to a specified date does not destroy the essentiality of time (*Barclay v Messenger* [1874–80] All ER Rep Ext 1908; [1874] 43 LJ Ch 449 at p 456; *Siah Kwee Mow & Anor v Kulim Rubber Plantations Ltd* [1979] 2 MLJ 190 at p 201; *Loke Yuen Cheng & Anor v Vimtex Sdn Bhd* [1998] 4 MLJ 169 at p 179). There is no limit on the number of extensions which can be given (*Spenser v Cali & Delonga* [1980] ANZ ConvR 485 cited in KE Lindgren, *Time In The Performance of Contracts* (2nd Ed) Butterworths at para 650). On point (ii), it was contended that the learned judge's finding is inconsistent with the first defendant's letters to the plaintiff dated 29 October 2013, 10 January 2014 and 29 January 2014 which clearly provided that the first defendant will exercise its right to terminate the SSA in the event of non-payment of the third payment by the extension date.

[10] Third, learned counsel argued that the provision of interest did not destroy the essentiality of the SSA. The *Berjaya Times Square* case relied by the learned judge is distinguishable on the facts. That case related to a liquidated damage clause in a building contract and not late payment interest. *Thornton v Basset* [1975] VR 407 at pp 420–421 was cited to support the proposition that an interest clause does not destroy the essentiality of them.

[11] On the issue of termination, the defendants' submission is that since the third payment was not made by the third extension date, the plaintiff breached its contractual obligations thereby entitling the first defendant to terminate the SSA pursuant to s 56(1) of the Contracts Act 1950.

[12] On the issue of specific performance, the defendants' submission is that the plaintiff should be disentitled to the remedy of specific performance because the plaintiff had displayed bad faith and lack of bona fides; those who come to equity must do so with clean hands (*Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu* [1997] 2 MLJ 45 (FC)).

[13] In reply, learned counsel for the plaintiff argued firstly that cl 3.3(c) of the SSA provided that any extension of time shall only be for an additional 14 days after the expiry date. However, in this case there had been more than one extension of time to effect the third payment. As such, the learned judge correctly construed cl 3.3(c) and found that cl 13 did not apply and that the extended time frames were outside the ambit of the SSA.

[14] Second, learned counsel for the plaintiff argued that the learned judge found, on the facts and circumstances including the conduct of the parties, that time was not intended and/or ceased to be of the essence. The learned judge had given four grounds for holding that time was not of the essence. Not all the four grounds were challenged by the defendants. The learned judge had also taken all the contemporary documents into consideration.

[15] Third, learned counsel argued that the first extension was granted voluntarily and unilaterally by the first defendant even though the plaintiff did not request for it. The first extension was granted because the first defendant knew that the plaintiff was going to procure financing. This is corroborated by the fact that at the meeting on 12 April 2014 which took place a few days before the third extension deadline, the first defendant asked for documents and it was only fair and reasonable for the plaintiff to come back with the documents. When the documents were supplied to the first defendant three days after the deadline expired, the first defendant did not object. There was a further meeting on 19 April 2014 wherein a representation was made that the payment date was brought forward from 15 March 2014 to 28 February 2014. However, the first defendant purported to terminate the SSA on 27 February 2014.

[16] Fourth, learned counsel argued that the series of extensions lead the plaintiff to believe that time was no longer of the essence (*Plenitude Holdings Sdn Bhd*).

[17] Fifth, learned counsel argued that in this case interest was stipulated to be payable. The first defendant's witness ('DW1') admitted that the imposition of interest was adequate compensation for the delay in payment. As such, the learned judge was correct to apply the principles in *Berjaya Times Square* in coming to her findings.

[18] Six, learned counsel argued that the plaintiff did not remain silent but took steps to engage the first defendant to negotiate to complete the performance of the third payment. There were meetings before and after the expiry of the deadline and evidence of negotiations between the parties. As such, time was allowed to pass and the parties went on negotiating for completion, then time is no longer of the essence of the SSA (*Webb v Hughes*).

[19] Lastly, learned counsel argued that the first defendant committed the initial breach under the SSA when the defendants failed to effect the proportional transfer of the shares in accordance with the payments made. This fact was admitted by DW1. Since the first defendant is a party in default, it is not entitled to exercise its rights under the SSA (*Berjaya Times Square*, *Pentadbir Tanah Daerah Petaling v Swee Lin Sdn Bhd* [1999] 3 MLJ 489 (CA)).

DECISION

[20] At the outset, we will address the last point raised by learned counsel for the plaintiff. In the High Court, the plaintiff had additionally contended that the termination of the SSA was also unlawful because the first defendant was allegedly the first to breach the SSA. Be that as it may, the learned judge did not make any finding on whether the first defendant committed the initial breach of the SSA. Instead, the learned judge found that the termination of the SSA due to non-payment of the third payment was unlawful as time was not of the essence. We accordingly agree with the submission of learned counsel for the defendants that the plaintiff is seeking to vary the decision of the learned judge without having filed a notice of cross-appeal under r 8 of the Rules of the Court of Appeal 1994. With respect, we think the last point is misconceived and the plaintiff is thereby precluded from raising this issue at the hearing of the appeal (*Kabushiki Kaisha Ngu v Leisure Farm Corp Sdn Bhd & Ors* [2016] 5 MLJ 557 (FC)).

[21] We will now deal with the main points raised by the defendants. In our view the key issue to be determined is this: Whether time is of the essence of the SSA after the expiry of due date for performance of the third payment?

[22] The first issue relates to the construction to be given to cl 13. In this connection, it is pertinent to advert to the following guidelines laid down by the Federal Court in *Berjaya Times Square* at para [42]:

(a) in interpreting a private contract a court is entitled to look at the factual background to the transaction;

(b) the factual background includes all material that was reasonably available to the parties;

(c) any part of the background that is declaratory of subjective intent of the parties must be disregarded; and

(d) the court should adopt an objective approach when interpreting a private contract.

[23] As a general rule, the time fixed for performance under a contract is determined by reference to the intention of the parties as expressed in the contract. It is generally accepted that in contracts where the phrase 'time is of the essence' is employed, the parties in these cases have clearly intended that the provisions dealing with time is an essential term of the contract. In this case, cl 13 is quite clear and unambiguous as to its intent and meaning. It stipulates that 'Time whenever mentioned in this Agreement shall be of the essence'. As such, the court must give effect to the plain meaning of the words. Accordingly, we do not agree with the learned judge's reasoning that the extended dates do

not come within the ambit of cl 13 because the new time frames are outside the ambit of the SSA and therefore not essential to the SSA.

[24] Be that as it may, the very fact that cl 13 provides that time is of the essence does not necessarily mean that time is of the essence. The test to be applied in determining this question has been enunciated succinctly by our apex court in the following passages:

'Whether or not time is of the essence of a contract must depend on the facts and circumstances of each case. Intention of the parties gathered from the instrument itself together with the surrounding circumstances must be looked at'.

Per Gunn Chit Tuan SCJ at p 295 in *Associated Pan Malaysia Cement Sdn Bhd v Syarikat Teknikal & Kejuruteraan Sdn Bhd* [1990] 3 MLJ 287 (SC).

'... [W]hether or not time had been intended to be of the essence would depend on the conduct and the dealings of the parties. There is no necessity in law that a clause making time of the essence must be expressed in any given contract. Similarly, the fact that there is a clause stating that time is of the essence does not ipso facto result in time being of the essence'.

Per Richard Malanjum CJ (Sabah and Sarawak) at p 478 in *Damansara Realty Bhd v Tan Sri Khoo Teck Puat & Anor*.

[25] Applying the principles enunciated above, it falls to be determined whether in all the circumstances of the case, it can be said that the parties intended that time to be of the essence for the performance of the third payment after the expiry of the third extension. This is a question of fact to be determined by reference to the conduct and dealings of the parties.

[26] In this regard, it is necessary to distinguish between the finding of a specific fact and a finding of fact which was really an inference from facts specifically found. Insofar as the finding of a specific fact is concerned, an appellate court is generally reluctant to reject a specific finding, particularly where the finding is founded on the credibility or bearing of a witness. However, an appellate court is entitled to form an independent opinion about the proper inference of fact, subject only to the weight which should be given to the judge's opinion.

[27] We have considered the defendant's arguments and perused the judgment of the learned judge. We are not persuaded that the learned judge had misdirected herself on the evidence or failed to judicially appreciate the

evidence or made wrong inference from the facts or misapprehended the facts. In other words, we do not think that that the findings of the learned judge are plainly wrong.

[28] Apart from examining the oral evidence and contemporaneous documents, the learned judge took into account the following pertinent facts:

(a) numerous extensions were granted by the first defendant to the plaintiff after the third payment became due;

(b) the parties agreed that interest is to be charged for the delay in payment of the third payment;

(c) the first defendant issued an invoice dated 15 December 2013 for interest charge on late payment;

(d) DW1's admission that imposition of late payment interest is adequate compensation for delay in payment;

(e) the first defendant allowed the original contractual due payment date for the third payment, the first extension, second extension and third extension to pass without terminating the SSA;

(f) there were two meetings between the parties on 12 February 2014 and 19 February 2014; and

(g) the parties went on negotiating for completion of the third payment.

[29] We are not persuaded that the learned judge fell into error in arriving at her finding that time has ceased to be of the essence based on the facts and circumstances of the case, including the conduct of the parties. There is no doubt that pursuant to cl 13 of the SSA time was originally of the essence of the contract. Even on 29 January 2014 in granting the third extension that position was maintained. But that had been waived by the conduct of the defendants. The correspondence and the dealings between the parties down to and including 20 February 2014 confirm this view. Time then was no longer of the essence of the contract. Once the time for completion was allowed to pass and the parties went on negotiating, then time was no longer of the essence of the contract and it is incumbent upon the first defendant to give a reasonable notice of its intention to abandon the contract if the third payment was not paid (*Webb v Hughes*; *Wong Kup Sing*; *Tilley v Thomas* (1867) LR 3 Ch App 61).

[30] For the foregoing reasons, we agree with the learned judge that the termination of the SSA by the first defendant is unlawful. The first defendant should have given the plaintiff notice to effect the third payment within a reasonable time failing which the first defendant shall be entitled to forthwith terminate the SSA. The first defendant did not give the plaintiff any notice of

its intention to terminate the SSA. Instead, the first defendant terminated the SSA peremptorily, just a day before the date which the plaintiff had proposed to pay the third payment. As the termination of the SSA is unlawful, it must follow that the SSA is a valid and subsisting contract.

[31] In this connection, we do not agree with the submission of the defendants that there was bad faith displayed by the plaintiff which should disentitle it to the remedy of specific performance. There is no evidence to support their contention that the plaintiff did not come with clean hands. Further, the defendants are estopped by their own conduct in negotiating with the plaintiff once the time for the performance of the third payment was over. In all the circumstances of the case, we agree with the learned judge that damages are not an adequate remedy as the subject matter of the SSA is the shares. We are satisfied that the learned judge correctly applied the legal principles to the facts of the case (see para 6(c)(i)–(iii)) above) and that the plaintiff is entitled to the remedy of specific performance.

[32] Accordingly, by a unanimous decision the appeal is dismissed with costs. The judgment of the High Court is affirmed.

Appeal dismissed with costs; judgment of the High Court affirmed.

Reported by Dzulqarnain Ab Fatar